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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 309(j)	)	PP Docket No. 93-253
of the Communications Act	)	
Competitive Bidding	)	

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COMMENTS OF THE AMERICAN WIRELESS COMMUNICATION CORPORATION

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Dated: November, 10, 1993

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SUMMARY

American Wireless Communication Corp. (AWCC) is a national consortium of small businesses, women and minority owned businesses, and rural telcos formed to assist the member firms as they pursue permanent PCS licenses. AWCC is uniquely aware of the need to ensure that these - and similar - firms participate in the provision of spectrum-based services, and urges the Commission to assist the groups identified by Congress by implementing the preferences enumerated in the Budget Act, as well as the supplemental provisions discussed in these Comments.

In these Comments, AWCC examines the constitutional issues raised by the Commission. As a threshold matter, AWCC believes that the Commission should implement the congressional directive to assist the entities enumerated in the Budget Act without undertaking to examine the constitutionality of the measures employed. Congress made clear its intent, and the Commission should effectuate that legislative mandate without questioning its constitutionality. Indeed, constitutional scrutiny is generally not the Commission's role.

Nonetheless, if the Commission maintains that the preferences will be subject to some heightened constitutional scrutiny, AWCC is confident that the preferential measures can pass constitutional muster. First, intermediate scrutiny would be the appropriate standard under which to review the program. Second, the goals of Congress in this matter are supported by adequate findings and constitute an important governmental purpose. Thus, they will satisfy the first prong of intermediate scrutiny. Finally, the

measures chosen by Congress will satisfy the second prong of intermediate scrutiny because they are substantially related to the achievement of congressional goals. Therefore, AWCC believes that the preferential measures discussed in these Comments will pass constitutional muster.

To implement the preferences mandated by Congress, AWCC recommends that the Commission employ a variety of measures. AWCC supports the Commission's proposal to set aside two blocks of spectrum for designated entity-only bidding, but urges the Commission to offer special aggregation rules for designated entities within those blocks. AWCC also favors bidding preferences that are linked to the percentage of designated group participation in an entity and installment payment plans fixed at the federal funds rate of interest. Moreover, AWCC encourages the Commission to endorse aggressive venture financing arrangements within the installment payment scheme. Finally, AWCC supports the Commission's proposal to offer tax certificates for investors in designated entities, and encourages the Commission to employ the same tax certificate programs that are currently offered in the broadcast and cable fields.

As to the scope of the preferences to be employed, AWCC believes that preferences offered to designated entities by the Commission should be available both within and outside of set-aside spectrum blocks. Particularly in light of the fact that the set-aside 20 MHz block C cannot be joined to a larger block under the 40 MHz aggregation ceiling, the Commission should ensure that designated entities can compete for the non-set-aside blocks.

Moreover, AWCC believes that preferences for rural telcos should be afforded to those entities only in geographic areas essentially coincident with their existing service areas. In addition, rural telcos should not be permitted to use any REA funds in any part of the auction process. As to small business eligibility, AWCC urges the Commission to maintain flexibility to conform its standards as the marketplace realities of PCs become more clear. Finally, AWCC urges the Commission to offer preferences to designated entity-inclusive consortia. Doing so will encourage partnerships between designated and non-designated entities, and will increase the opportunities for designated entities to participate in the provision of spectrum-based services. AWCC suggests a "percent participation benefit" that affords preferences based on the percent of designated entity participation in a consortium.

AWCC also urges the Commission to consider designated entities when implementing the various financial requirements addressed in the NPRM. First, AWCC supports the SBAC proposal to permit designated entities to self-certify their financial qualifications in applications to bid. Second, while AWCC agrees that only serious and qualified bidders should be allowed to participate in the auction process, AWCC believes that the Commission should consider a 50 percent discount to the up-front payments and deposits required of designated entities. Moreover, AWCC encourages the Commission to accept investment bankers' highly confident letters in lieu of high deposit fees, and to permit up-front payments to be made at the time of auction.

AWCC believes that to ensure the participation of designated entities in the provision of spectrum-based services, the Commission should employ special aggregation rules for those entities. Specifically, AWCC suggests permitting designated entities to aggregate the 20 MHz block with a 30 MHz block, and to aggregate set-aside spectrum with the 10 MHz blocks held by local cellular providers.

AWCC believes that there must be appropriate safeguards and limitations to ensure that the benefits of the preferences flow to the intended groups. First, AWCC supports a bright line three year trafficking prohibition for all set-aside spectrum block licenses, but suggests that the Commission waive the prohibition for transfers to other designated entities. Second, to assess the eligibility of consortia for preferential measures, AWCC urges the Commission to employ the test currently used in reviewing applications of limited partnerships to acquire broadcast facilities through distress sales (i.e., designated group voting control plus a minimum 20 percent equity holding). Finally, while AWCC is aware of the need for effective anticollusion rules, AWCC encourages the Commission to remain sensitive to the need of designated entities to pool capital and expertise, and to avoid restricting that cooperation through unduly restrictive anticollusion provisions.

Finally, AWCC supports the Commission's proposals to auction all geographic regions within one spectrum block before proceeding to auction the next spectrum block, and to auction the various blocks in descending order of bandwidth. This procedure will

assist designated entities in organizing partnerships with larger non-designated groups. For this reason, and to avoid big-firm concentration in the largest markets, AWCC opposes the Commission's proposal to auction spectrum blocks by region in descending order of population. AWCC does, however, support the Commission's proposal to permit combinatorial bidding.

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COMMENTS OF THE AMERICAN WIRELESS COMMUNICATION CORPORATION

American Wireless Communication Corp. (AWCC), by its attorneys and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, submits these Comments in response to the above-captioned Notice of Proposed Rule Making (NPRM) adopted by the Commission on September 23, 1993, and released on October 12, 1993.

I. INTRODUCTION

AWCC is a national consortium of small businesses, women and minority owned businesses, and rural telcos, formed to provide assistance to these firms as they pursue permanent PCS licenses in the 2 GHz spectrum range. The goals of AWCC are to provide bidding strategy for individual member firms, for member firms in combination with national partners, and to help attract capital for member firms as they undertake to establish PCS operations. AWCC will also independently provide PCS services to subscribers in various regions of the country.

Since AWCC is wholly comprised of small, women owned, minority owned, and rural telco businesses, the organization is uniquely cognizant of the need to ensure that these entities participate in the provision of spectrum-based services. Indeed, this is the directive to the Commission from Congress, and AWCC is pleased to offer these Comments to the Commission as it undertakes to fulfill that legislative mandate.

In particular, AWCC hopes that the Commission will recognize - and carry on - this Nation's rich history of helping many groups of people and businesses to enjoy the benefits of economic and social inclusion and participation. Toward this end, AWCC supports preferential measures for each of the groups designated by Congress for special treatment. Helping these groups to attract the capital and other resources with which to establish sophisticated PCS systems will pay dividends to the designated entities for many years, and will permit the Commission to satisfy its legislative mandate.

Nonetheless, to ensure that the benefits of these measures inure only to the intended groups, AWCC urges the Commission to adopt appropriate safeguards and limitations to prevent the unjust enrichment of those groups that do not need the assistance of the Federal Government to overcome the lingering effects of past discrimination. Only an appropriately tailored program will truly foster economic and

technical independence for the groups enumerated by Congress. AWCC offers these Comments in support of such a tailored program.

II. CONSTITUTIONAL CONSIDERATIONS

A. The Commission must not allow its constitutional review to subvert the clear intent of Congress.

The Commission notes that new subsection 4(D) of Section 309(j) directs the Commission to ensure that small businesses, rural telcos, and businesses owned by women and minorities are "given the opportunity to participate" in the provision of spectrum-based services. NPRM ¶ 72. However, before addressing its specific proposals on how to implement this Congressional directive, the Commission states that "it is appropriate to address at the outset the legal issues raised by these proposals." NPRM ¶ 73. The Commission then goes on to ask a number of questions aimed at determining the constitutionality of this provision. NPRM ¶¶ 73-76.

At the outset, AWCC wishes to clarify the scope of the Commission's authority with regard to its examination of the statute's constitutionality. While the Commission may appropriately examine and be sensitive to constitutional concerns in deciding congressional intent where such intent is otherwise ambiguous, the Commission cannot subvert the clear intent of the statute on the Commission's own view that

the implementation of the statute would raise constitutional concerns. Generally speaking, "federal administrative agencies are without power or expertise to pass upon the constitutionality of administrative or legislative actions." Spiegel, Inc. v. F.T.C., 540 F.2d 287, 294 (1976).

Thus, in the instant case, where Congress has clearly stated that the Commission must promote economic opportunity for certain enumerated groups, it is not appropriate for the Commission to evaluate the constitutionality of that clear Congressional directive. In this regard, AWCC submits that the Commission's concern about developing a record to support the constitutionality of its race and gender-conscious measures appears to be unfounded. NPRM ¶ 73. Indeed, it would be beyond the scope of the Commission's authority to pass constitutional judgment on this congressional mandate.

Moreover, AWCC submits that the Commission need not be concerned about the constitutional issues it has raised. Congress did not limit the suggested preferences to any one group based on a racial or gender classification, nor did Congress indicate that a race or gender distinction was its goal. Indeed, as the Commission noted, Congress' concern was with "providing economic opportunity to a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women." NPRM ¶ 73 n. 48, quoting new Section 309(4)(j)(C)(ii) (emphasis added). The Commission went on to

explicitly note that "the text of the provision also does not appear to provide a specific finding in support of race and gender specific measures." Id. Thus, the classification Congress intended was a classification based on an economic rationale -- the need for providing economic opportunity for certain businesses, not a classification for awarding licenses on the basis of race or gender. Congress then enumerated certain of the groups in need of economic opportunity, and directed the Commission to provide these groups with these opportunities.

Thus, the Commission is not correct when its asserts that "measures for a rural telcos and small businesses could be reviewed under a more deferential judicial standard" (NPRM ¶ 73, citing FCC v. Beach Communications, Inc., 61 U.S.L.W. 45393 (U.S. June 1, 1993.) while measures for women and minority owned businesses will require greater scrutiny. NPRM ¶ 73. All measures adopted by the Commission under Section 309(j) are based on the need for economic opportunity. Thus, AWCC asserts that a court reviewing the provisions enacted by Congress - and implemented by the Commission - will examine the provisions under a standard of scrutiny reserved for non-suspect classifications[1] (i.e., classifications not based, inter alia, on race or gender). As a result, AWCC believes

[1]See, e.g., Harris v. McRae, 448 U.S. 297, 323 (1980), reh'g denied 448 U.S. 917 (1980) (applying rational basis scrutiny to measures designed to help those in poverty - a non-suspect class).

that the Commission should implement the goals of Congress without undertaking to analyze the merits of the provisions under a constitutional scope. Congress, in its considered judgment, enumerated several groups for special help by the Commission, and the Commission should effectuate that legislative mandate.

B. Constitutionality of the Minority Preference Provisions

Notwithstanding the fact that the Commission need not, nor should not, conduct a constitutional review to the extent that it subverts Congressional intent, AWCC submits that the proposals tentatively adopted by the Commission i.e. -- spectrum block set-asides, bidding preferences, installment payments and tax certificates -- can easily pass constitutional muster.

1. Standard of Scrutiny to be Applied

The Commission observes that a court reviewing any benign race-conscious measures mandated by Congress will conclude that the measures are constitutionally permissible if they serve important governmental objectives within the power of Congress and are substantially related to the achievement of those objectives. NPRM ¶ 73. This standard of review is known as intermediate scrutiny. Metro Broadcasting v. F.C.C., 110 S.Ct. 2997, 3031 (1990) (O'Connor, J., dissenting). In lieu of intermediate scrutiny, the Supreme Court has applied

what is called strict scrutiny to minority preference programs not mandated by Congress. See City of Richmond v. J.A. Croson Company, 488 U.S. 469, 505-507 (1989); Wygant v. Jackson Bd. of Educ., 476 U.S, 267, 274 (1986). Strict scrutiny examines whether preferential measures serve compelling governmental objectives and are necessary to the achievement of those objectives.

If a reviewing court is to examine the instant provisions under any standard greater than rational basis scrutiny, AWCC agrees with the Commission that intermediate scrutiny is appropriate. The Supreme Court declared in Metro Broadcasting that "benign race-conscious measures mandated by Congress - even if those measures are not "remedial" in the sense of being designed to compensate victims of past governmental or societal discrimination - are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to those objectives." Metro Broadcasting, 110 S.Ct. at 3008-09. AWCC believes that this standard could apply in the instant case.

At this point it is important to address the issues raised in footnote 47 of the NPRM -- the Commission's tentative belief that PCS licensees "will probably not engage in services that involve the exercise of editorial control." NPRM ¶ 73 n. 47. The Commission's tentative belief appears to rely on the House Report statement that "unlike mass media

licenses, where diversity of ownership contributes to diversity of viewpoints, most licenses issued pursuant to Section 309(j) will be services where the race or gender of the licensee will not affect the delivery of the service to the public." Id.; H.R. Rep. No. 103-111 at 255. However, since the House Report was compiled, the legal underpinning in support of that statement has undergone a significant and fundamental change. On August 24, 1993 the United States District Court for the Eastern District of Virginia held that a common carrier provider has a First Amendment right to freely express its viewpoints across its common carrier network. Chesapeake & Potomac Telephone Co. of Virginia v. U.S., 1993-2 Trade Cases ¶ 70, 339 (1993). It can no longer be assumed, therefore, that PCS licensees will not engage in services that will contribute to viewpoint diversity. The legal and regulatory hurdles that traditionally would have barred viewpoint discretion by PCS licensees are beginning to fall. Thus, the intermediate review standard of Metro Broadcasting is particularly applicable to the instant analysis.

Moreover, applying intermediate, as opposed to strict, scrutiny is consistent with the deference shown by the Supreme Court to the role of Congress in mandating minority preferences before. In Fullilove v. Klutznick, 448 U.S. 448 (1980), for example, the Court noted that Congress occupied a special position among the three branches of government with

respect to content and the quality of the basis on which preferential measures may be ordered. The Court explained that "Congress, of course, may legislate without compiling the kind of "record" appropriate with respect to judicial or administrative proceedings." Id. at 478. That Congress may act on a weaker factual underpinning than other governmental bodies is consistent with the Court's policy of examining the result of the congressional action under a lower standard of scrutiny.

Similarly, in Croson, Justice O'Connor wrote in a plurality opinion, "That Congress may identify and redress the effects of society-wide discrimination does not mean, a fortiori, the States and their political subdivisions are free to decide that such measures are appropriate." Croson, 488 U.S. at 490. Thus, in Croson, as in Fullilove, the deference shown to Congress was clear. For this reason, AWCC supports the Commission's conclusion that intermediate scrutiny would be appropriate in the instant case.

Notwithstanding this analysis, AWCC acknowledges that four Justices dissented from the decision of the Supreme Court in Metro Broadcasting. Those Justices maintained that the Court should apply strict scrutiny when reviewing any program that accords preferences based on race, regardless of the source of the program. Metro Broadcasting, 110 S.Ct. 3030 (O'Connor, J., dissenting). In support of that position, Justice O'Connor asserted that the deference shown to Congress

in the Croson opinions reflected the authority of Congress only insofar as it emanated from Section 5 of the Fourteenth Amendment. Because Section 5 empowers Congress to act only with respect to the States, Justice O'Connor argued, the special latitude given to Congress - and the lower scrutiny that came with it - did not extend to the facts of Metro Broadcasting, which concerned a federal program administered by federal officials. Id.

AWCC notes, however, that the Court in Fullilove recognized the many sources of authority under which Congress may act in the area of minority preferences. Chief Justice Burger indicated that the public works employment program upheld in that case could have been lawfully enacted by Congress under the Spending Power of Article I, § 8, cl. 1, under the Commerce Clause of Article I, § 8, cl. 3, or under Section 5 of the Fourteenth Amendment. Fullilove, 448 U.S. at 473-75. Indeed, the Chief Justice acknowledged that the program reviewed in Fullilove was enacted principally as an exercise of the Spending Power. Id. at 473-74. Moreover, in a concurring opinion, Justice Powell expressly recognized the authority of Congress to address minority preference issues under the Commerce Clause, as well as under the Civil War Amendments. Id. at 499-502 (Powell, J. concurring). Thus, that the instant minority preference provisions were not enacted by Congress under Section 5 of the Fourteenth

Amendment does not mean that intermediate scrutiny is not still applicable.[2]

Accordingly, AWCC agrees with the Commission that intermediate scrutiny is the appropriate standard under which to review a minority preference program mandated by Congress. What follows is a review of the instant minority preference provisions under the two prongs of that intermediate scrutiny. This analysis confirms the AWCC view that the preferences

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[2] Assuming arguendo that the Supreme Court as presently constituted would overrule the Metro Broadcasting intermediate scrutiny holding, AWCC asserts that the instant preference provisions would still pass constitutional muster. As noted above, Justice O'Connor, dissenting in Metro Broadcasting, maintained that the Fullilove Court applied strict scrutiny to the minority preference program reviewed in that case. Indeed, Justice Powell expressly applied strict scrutiny to the program in his concurring opinion in Fullilove. See Fullilove, 448 U.S. at 507 (Powell, J. concurring). Under both Chief Justice Burger's examination (reported to be strict scrutiny by Justice O'Connor) and Justice Powell's review, however, the public works employment program at issue in Fullilove was upheld.

AWCC, in turn, notes that the instant program bears considerable resemblance to that which passed muster in Fullilove. Here, as in Fullilove, Congress directed a federal agency to administer a preference program designed principally to ensure economic opportunity for members of minority groups. See Section 2 infra; Fullilove, 448 U.S. at 459-61. Both programs are premised on a lack of opportunity found to be available to minority groups in the two fields, and both programs are to be administered on a national scope. Although Congress included specific provisions for exemption and waiver in the Fullilove program (and thus ensured that the program was narrowly tailored), the Commission can employ such provisions here to see that the instant programs fares better on review. See Adarand Constructors, Inc. v. Skinner, 790 F.Supp. 240, 244 (D. Colo. 1992) (upholding U.S. Department of Transportation minority preference program that had no congressionally mandated waiver provision, but which was governed by a waiver provision instituted by the agency).

recommended by Congress and proposed by the Commission can pass constitutional muster.

2. Prong 1: The Minority Preferences Serve an Important Governmental Purpose

The Commission has noted that the legislative history of the Budget Act "provides little guidance regarding the relationship between the preferential measures and the goal Congress hopes to achieve. . . ." with those measures. NPRM ¶ 73 n.48. The Commission submits, however, that other similar provisions in Title VI of the Budget Act provide a more distinct view of the intent of Congress in enacting the provisions. Id. That intent, according to the Commission, was to provide economic opportunities for members of minority groups through the provision of spectrum-based services. Id. AWCC agrees with the Commission's determination of the legislative intent behind Section 309(j)(4)(D), and submits that this intent qualifies as an "important governmental purpose within the power of Congress."

To ascertain the goals of Congress underlying the minority preference provisions at issue in the Fullilove and Metro Broadcasting decisions, the Supreme Court in each case reviewed the findings made by Congress in support of those provisions. Fullilove, 448 U.S. at 477-80; Metro Broadcasting, 110 S.Ct. at 3009-11. Although there are no specific findings in the legislative history of the Budget Act with respect to the lack of economic opportunity for

minority-owned businesses, Congress has examined that lack of opportunity - both in and out of the communications field - before.

In a House conference report accompanying the Communications Amendments Act of 1982, for example, the Conference Committee asserted that diversifying the media of mass communications was important because it promoted "ownership by racial and ethnic minorities - groups that traditionally have been extremely underrepresented in the ownership of telecommunications facilities . . . ." H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 43, reprinted in 1982 U.S.C.C.A.N. 2261, 2287. See also Metro Broadcasting, 110 S.Ct. at 3013-16 (detailing the many times Congress has considered telecommunications minority preferences). Moreover, in debate on a Department of Defense minority owned-business preference program, the sponsors of the legislation pointed to the disparity between the percentage of defense contracts going to minority businesses in 1985 (2.2 percent) and the percentage of military personnel from minority groups at the same time (26.7 percent) as evidence that the preference was needed. 131 Cong. Rec. H 4981, 4982-83 (daily ed. June 26, 1985) (statements of Reps. Savage and Conyers). Similarly, a Department of Transportation minority owned-business preference was introduced in 1982 because minorities at that time were experiencing markedly greater unemployment than the national average (20 percent black unemployment

versus the national figure of 10.8 percent). 128 Cong. Rec. H 8954 (daily ed. Dec. 6, 1982) (statement of Rep. Mitchell). The transportation preference program was offered simply to provide a source of jobs for minorities, and was passed without opposition. Id. Through these and other examinations of the lack of opportunities for minority owned-enterprises, Congress has developed an institutional expertise on the issue of minority opportunities.

This developed expertise is important for the purposes of constitutional scrutiny. In his concurring opinion in Fullilove, Justice Powell discussed the nature of the legislative process as it applied to congressional findings in support of a legislative purpose. Justice Powell explained:

> [The] special attribute [of Congress] as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue. One appropriate source is the information and expertise that Congress acquires in the consideration and enactment of earlier legislation. After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area.

Fullilove, 448 U.S. at 502-03 (Powell, J., concurring) (emphasis added). Since a full appreciation of the legislative process counsels against a court limiting its analysis to the legislative history of the Act under review, Metro Broadcasting, 110 S.Ct. at 3013, AWCC maintains that the congressional goal of providing economic opportunity for

minority owned-businesses is supported by relevant legislative findings.

Moreover, the goal of providing economic opportunity for minority owned-businesses has been found before to be an "important governmental purpose." In Fullilove, for example, the Court considered the merits of a minority preference provision that required at least 10 percent of federal funds granted for local public works projects to be used by the state or local grantee in contracts with minority owned-businesses. Underlying that provision was a determination that the minority business community was "'sorely in need of economic stimulus but which, on the basis of past experience with government procurement programs, could not be expected to benefit from the public works program as then formulated.'" Fullilove, 448 U.S. at 459 (quoting 123 Cong. Rec. 5097, 5097-98 (1977) (remarks of Rep. Mitchell)). See also Fullilove, 448 U.S. at 459 (indicating that the preference was designed to "'promote a sense of economic equality in this Nation'"). Against this background, the Court found that the establishment of a preference was within the power of Congress. Id. at 475-77. See also Adarand Constructors, Inc. v. Skinner, 790 F.Supp. 240, 245 (D. Colo. 1992) (upholding the Department of Transportation minority preference program where the important government purpose was to decrease high minority unemployment). The congressional purpose in the instant matter is no different than the goals found to be

"important" and "within the power of Congress" in Fullilove and Adarand Constructors. Thus, the minority preference provisions enacted in section 309(j)(4)(D) serve an important governmental purpose within the power of Congress.

3. Prong 2: The Budget Act Preferences are Substantially Related to that Important Governmental Purpose

The Budget Act preferences are substantially related to the government purpose of creating economic opportunities for minority owned-businesses. As noted in section 2, supra, Congress has developed an institutional expertise in the areas of minority preferences and opportunities for minority owned-businesses, and that expertise is entitled to great weight from reviewing courts. In mandating specific preferences for members of minority groups in the past, and in the instant case, Congress has made clear its view that the goal of creating economic opportunities for minorities is advanced by such preferential measures.

Even without the deference shown to the considered judgment of Congress, it is apparent that affording minority owned-businesses greater access to licenses for spectrum-based services will help to create economic opportunities for those businesses. Through the provision of PCS under the authority of a Commission license, or through the sale of that license to another industry member, the preferred minority owned-business will able to generate considerable revenues that might not otherwise be accessible. The preferences,

thus, are substantially related to the important governmental purpose.

Notwithstanding the preceding analysis, as part of the review of prong two of intermediate scrutiny a variety of courts reviewing minority preference programs have examined whether the programs are narrowly tailored to serve the important governmental purpose. Narrow tailoring is invoked to ensure that there is an appropriate fit between the means chosen by Congress (here, preferential measures) and the ends sought to be advanced (economic opportunity). In Fullilove, for example, the Court determined that the Public Works Employment Act preferences were narrowly tailored - and, thus, substantially related to the important governmental purpose - because the preferences included specific provisions for "exemption" and "waiver." The exemption provision ensured that only legitimate minority owned-businesses participated, and the waiver provision ensured that the bright line minority participation goal (10 percent) would be waived when no qualified minority owned-businesses (i.e., those with the capacity to complete the work contracted for) were available. Fullilove, 448 U.S. at 486-87. The provisions thus ensured that the minority preference program did not overreach the scope of the important governmental purpose. See also Adarand Constructors, Inc. v. Skinner, 790 F.Supp. 240, 244-45 (D. Colo. 1992) (finding the Department of Transportation minority